82-992

Office-Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. A-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION, *Appellant*,

v.

UNITED STATES, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL TELEPHONE LABORATORIES, INC., WESTERN ELECTRIC COMPANY, INC., and numerous intervenors,
Appellees.

On Appeal From The United States District Court For The District Of Columbia Circuit

JURISDICTIONAL STATEMENT

ALBERT H. KRAMER
Counsel of Record
N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Did the District Court correctly construe and apply the Administrative Procedures and Penalties Act in reaching the conclusion that a settlement agreement precluding Bell Operating Company participation as suppliers of unregulated CPE, although within the reaches of the public interest, ought not to be entered because the court's conception of the remedy that would maximize competitive conditions in CPE markets differed from the Department of Justice's view of the remedy that would maximize competitive conditions?

LIST OF PARTIES IN THE COURT BELOW

The following parties appeared in the court below:

Plaintiff; United States of America

Defendants; American Telephone and Telegraph Company, Bell Telephone Laboratories, Inc., Western Electric Company, Inc.

Intervenors; Ad Hoc Telecommunications Users Committee; Alabama Public Service Commission; Alarm Industries Telecommunications Committee; American Newspaper Publishers Association; American Petroleum Institute; American Satellite Company; Associated Telephone Answering Exchanges, Inc.; Association of American Railroads; Association of Data Communications Users; Association of Data Processing Service Organizations; Audichron Company; Black Citizens for a Fair Media; California Hispanics; Citizens Utilities Company; Communication Commission of the National Council of the Churches of Christ in the USA; Communications Workers of America; Compuserve, Inc.; Computer and Business Equipment Manufacturers Association; Computer and Communications Industry Association; Compuserve, Inc.; Congress Watch; Continental Telecom, Inc.; D/FW Signal, Inc.; Education and Cultivation Division of the General Board of Global Ministries of the United Methodist Church; Federal Communications Commission;[1] General Dynamics Communications Co.; General Telephone & Electronics Corp.; Independent Data Communications Manufacturers Association; In-

---

[1] The Federal Communications Commission was granted intervenor status by the court. Subsequently, the agency requested that it be considered an *amicus curiae* and not an intervenor. This request was granted.

dependent Telecommunications Suppliers' Council; International Telephone and Telegraph Corp.; Jack Faucett Associates, Inc., *et al.*; Leghorn Telepublishing Co.; MCI Communications Corp.; Mobile Marine Radio, Inc.; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Association of Broadcasters; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Cable Television Association; National Catholic Broadcasters Association; National Citizens Committee for Broadcasting; National Latino Media Coalition; National Newspaper Association; North American Telephone Association;[2] Northeastern Telephone Co.; Office of Communication of the United Church of Christ; Reformed Church in America; Rogers Radio Communication Services, Inc.; Rural Telephone Coalition; San/Bar Corp.; Satellite Business Systems; Sonitrol Distributers Council, Inc.; Southern Pacific Communications Co.; Sperry Corporation; Stromberg-Carlson Corp.; Tandy Corporation; Telocator Network of America; U.S. Telephone Communications, Inc.; United States Independent Telephone Association; United States Telecommunications Suppliers Association; United Telecommunications, Inc.; Utilities Telecommunications Council; Warner Amex Cable Communications, Inc.; Western Union Telegraph Co.; Westinghouse Broadcasting and Cable, Inc.; States of Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, Missouri, New Mexico, New

---

[2] The North American Telephone Association is a trade association with approximately 350 members. A list of the Association's members will be made available upon request. The Association has no parent company and no subsidiary or affiliated companies.

Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin; Public Service Commissions of Arkansas, California, District of Columbia, Florida, Idaho, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New York, South Dakota, Utah, West Virginia, Wisconsin, Wyoming; Iowa Commerce Commission; Kansas Corporation Commission; New Mexico Corporation Commission; Office of the Consumers' Counsel, State of Ohio; Oklahoma Corporation Commission; Virginia State Corporation Commission; Washington Utilities and Transportation Commission; City of Cincinnati; City of New York.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS OF THE COURT BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASON FOR PLENARY CONSIDERATION	10
APPENDIX	1A

TABLE OF AUTHORITIES

CASES: Page

United States v. *Agri-Mark, Inc.*, 512 F.Supp. 737 (D. Vt. 1981) 10

United States v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976) 9

United States v. *Automobile Manufacturer's Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd mem. sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970) 8

United States v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied sub nom. Bechtel Corp.* v. *United States*, 454 U.S. 1083 (1981) 9, 10

United States v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978) 10

United States v. *Carter Products, Inc.*, 211 F.Supp. 144 (S.D.N.Y. 1962) 8

United States v. *Combustion Engineering, Inc.*, 364 F.Supp. 181 (D. Conn. 1972) 9

United States v. *International Telephone & Telegraph Co.*, 349 F.Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom. Nader* v. *United States*, 410 U.S. 919 (1973) 8, 9

United States v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970) 9

United States v. *National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Cal. 1978) 9

STATUTES:

15 U.S.C. § 2 (1976) 2

15 U.S.C. § 16 (1976) ..... 2, *passim*

15 U.S.C. § 29(b)(1976) 3

OTHER:

H. Rep. No. 528, 93d Cong., 1st Sess. (1973) 9

S. Rep. No. 298, *Antitrust Law Amendments*, 93d Cong., 1st Sess. (1973) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. A-464

NORTH AMERICAN TELEPHONE ASSOCIATION, *Appellant*,

v.

UNITED STATES, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL TELEPHONE LABORATORIES, INC., WESTERN ELECTRIC COMPANY, INC., and numerous intervenors,
Appellees.

On Appeal From The United States District Court For The District Of Columbia Circuit

JURISDICTIONAL STATEMENT

OPINIONS OF THE COURT BELOW

The opinions of the United States District Court for the District of Columbia Circuit of August 11, 1982, (declining to enter proposed order) (J.A. 1[3]), August 23, 1982 (denying reconsideration of certain aspects of the August 11, 1982 opinion) (J.A. 195), August 24, 1982 (modifying final judgment) (J.A. 173) and November 10, 1982 (certifying appeal) (J.A. 204) have not been reported.

[3] "J. A." citations refer to pages of the Joint Appendix to Jurisdictional Statement of Appellants.

STATEMENT OF JURISDICTION

The District Court proceedings in C.A. No. 74-1698 were initiated in 1974 with a civil complaint filed by the United States charging violations of section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), by American Telephone and Telegraph Company, Western Electric Company and Bell Telephone Laboratories, Inc. (collectively, "AT&T"). An earlier government antitrust prosecution of American Telephone and Telegraph Company and Western Electric Company in the United States District Court for the District of New Jersey had been resolved in 1956 by the entry of a consent order. In January of 1982, the principal parties to the 1956 order filed papers seeking a modification of the 1956 consent order and requested that the proceeding be transferred to the United States District Court for the District of Columbia. The 1956 case was transferred and consolidated with the 1974 case; AT&T and the Department of Justice sought dismissal of the 1974 prosecution. The parties stipulated, with the agreement of the court, that the mechanisms of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (1976), should apply to consideration of the judicial actions requested. On August 11, 1982, Judge Greene, before whom these requests lay, declined to enter the orders agreed to by the parties but indicated that, if certain modifications were made in the agreement negotiated by the United States and AT&T, he would accede to the settlement arrangements. (J.A. 1, 106-9, 170.) The alterations proposed by Judge Greene were effected and, on August 24, 1982, the court entered a stipulation for the voluntary dismissal of the 1974 case and a modification of the 1956 consent decree. (J.A. 173.) An order granting the status of intervenor to, *inter alia*, the North American Telephone Association was filed on August 26, 1982. (J.A. 191, 193.) The North American Telephone Associa-

tion filed a notice of appeal in the United States District Court for the District of Columbia on October 25, 1982. (J.A. 222.) In response to motions by the United States and three intervenors, the District Court, on November 10, 1982, certified all pending appeals to this Court pursuant to 15 U.S.C. § 29(b) (1976). (J.A. 204.)

STATUTES INVOLVED[4]

15 U.S.C. § 2

15 U.S.C. § 16

15 U.S.C. § 29

STATEMENT OF THE CASE

The persuasion that AT&T had employed its preeminent position in the telecommunications business to work violations of the antitrust laws has resulted in two government actions against that firm in the past twenty-five years. Both of those proceedings are merged in this case.

The litigation begun by the government in 1949 was concluded through the entry of a consent judgment in 1956. A primary focus of that lawsuit was the government's conviction that AT&T had unlawfully carved out a monopoly for the products manufactured by Western Electric Company, one of the constituent entities of the Bell System, including the telephone terminal equipment

[4] The text of these provisions is set out at J.A. 242-47.

devices that have come to be called "customer premises equipment" or "CPE".[5]

The 1956 settlement negotiated between the Department of Justice and AT&T did not seek to remove AT&T from its monopoly position in CPE markets. Instead, the 1956 settlement limited AT&T's business undertakings to areas "subject to public regulation" on the theory that such regulation would, among other things, effectively contain the companies' power to extract monopoly profits from CPE consumers. By 1974 it had become apparent to the government that this protection was no longer sufficient. In the years between entry of the 1956 consent decree and initiation of the 1974 litigation the contours of CPE markets had changed dramatically. Tariffs prohibiting the interconnection to local telephone exhanges of CPE other than that manufactured or approved by AT&T were eliminated by actions of the Federal Communications Commission, opening CPE markets to competing manufacturers and suppliers. Indeed, the purpose of the F.C.C.'s actions had been to open these markets to competition.

The 1974 litigation proceeded on the theory that AT&T had violated the antitrust laws in its efforts to stifle the development of this competition in CPE markets. By application of its monopoly power in providing basic telephone exchange transmission service, exercised through

---

[5] The North American Telephone Association ("NATA") is a trade association representing the interests of firms that compete with AT&T in the manufacturing and supplying of CPE. Although the District Court litigation involved other issues, NATA's interest and the focus of this submission are limited to the court's actions concerning CPE.

the 22 Bell Operating Companies ("BOCs"), AT&T was able to engage in discriminatory and exclusionary conduct as well as subsidize its own CPE offerings so as to exclude entirely or limit the markets of its CPE competitors. The 1956 consent decree was insufficient to curb those practices. The government and AT&T agreed to settle the 1974 case through a modification of the 1956 consent decree. The proposed settlement would have divested AT&T from ownership of the BOCs in order to separate AT&T's competitive CPE activities from its control over the monopoly "bottleneck" of the local telephone transmission service companies. This would, by the government's assessment, limit AT&T's ability to continue to commit anticompetitive practices in the CPE markets. The proposed agreement would also have prohibited the divested BOCs from providing CPE. The government theorized that if AT&T had been able to use the monopoly resources of the local telephone companies to curtail CPE competition, the divested BOCs could continue to do the same; only by insisting that the monopoly exchange firms be barred from competitive CPE markets could this potential for mischief be averted.

Following publicaton of the settlement proposal and the submission of a considerable volume of public comment on it, the agreement was put before the trial court for evaluation under the standards of the Antitrust Procedures and Penalties Act. Judge Greene found that the public interest would be advanced—the operative standard in the statute—by the proposed divestiture provisions. He was not convinced, however, that the divested BOCs should be barred from future participation in the marketing[6] of CPE. Judge Greene concluded that the

---

[6]Judge Green agreed that the divested companies ought not to be permitted to manufacture CPE.

state of competition in CPE markets would be improved if the divested BOCs were eligible to compete with AT&T and others in the supply of CPE.

The difference between Judge Greene and the government involves variant predictions of the future conduct of the divested BOCs, their relation to CPE markets, and the nature of those markets. The government, having seen these companies and their local service monopolies used as instruments in the suppression of competition in CPE markets, feared a recurrence of anticompetitive conduct and secured a settlement agreement that would have barred the possibility of future abuses. The theory of the case advanced by the Department of Justice emphasized the risk that the Bell Operating Companies might subvert competition in CPE markets through anticompetitive practices carried out on the strength of the local exchange monopolies of these companies. The relief structured through the settlement negotiated by the government was responsive to this thesis. In the government's view, the removal of the Bell Operating Companies from CPE markets would prove a spur to the growth of competition.[7]

---

[7] The government explained these arguments in considerable detail in pleadings filed throughout the course of the settlement agreement proceedings conducted by the District Court. The government's position is summarized in a pleading objecting to Judge Greene's August 11, 1982 determination that the BOCs ought not to be excluded from CPE markets. The text of that submission is set forth in the Appendix to this Jurisdictional Statement. Although the Department of Justice did finally agree to settle its litigation on the terms dictated by Judge Greene, its continued dedication to the originally proposed settlement terms is reflected in a memorandum filed by the government with the revised decree. The text of that memorandum is set out in the Appendix at 11a.

Judge Greene approached the issue of relief very differently. Judge Greene felt that the likelihood of future anticompetitive acts by the BOCs was remote. The judge concluded that the goals of the antitrust laws would be better served by permitting the divested companies to engage in the marketing of CPE as, essentially, new competitors with AT&T. Instead of addressing the structure of the CPE markets with an eye to their future development, Judge Greene emphasized the immediate boost to competition that would be worked by BOC participation in the supply of CPE. In short, the District Court opted for its own view that an immediate increase in the number of CPE market competitors was superior to the structural protections against future anticompetitive activities endorsed by the government.

NATA believes that Judge Greene was wrong in refusing to approve the proposed settlement. The settlement provision precluding BOC involvment in CPE markets is in the "public interest" as that term is used in the Antitrust Procedures and Penalties Act. The bar against CPE activities by the divested BOCs provides an important protection against future antitrust violations. Judge Greene gave too little weight to the importance of such safeguards. He assigned too much credit to the short run value of offsetting AT&T's dominant position in CPE markets with the countervailing competitive strength of the BOCs as a supplement to existing competition in those markets.

Even were one to conclude that Judge Greene's predictive assessment of the future posture of the BOCs in CPE markets is more likely to be correct than the view of the Department of Justice, it was error for the District Court to elevate its views over those of the government. The factors to be considered by the court in determining whether to approve a proposed settlement were set forth

in *United States* v. *Automobile Manufacturer's Association*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd mem. sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970):

> This Court does have the power to disapprove the proposed settlement, but its use requires the exercise of discretion based upon legal, as distinguished from administrative, considerations. For instance, the Court should withhold its approval if the decree be unenforceable or if it should provide for relief not consistent with the prayer of the complaint. The Court may properly consider whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree, on the whole, is against the public interest.

307 F.Supp. at 621.[8]

The District Court found that the proposed settlement was within the reaches of the public interest. (J.A. 32-33) Judge Greene also concluded that the negotiated agreement did not jeopardize the rights of any third parties. The court did, however, differ with the Department of Justice over what constituted the most effective available remedy, even though courts have traditionally accorded great deference to the Department of Justice, particularly insofar as the Department has determined that the relief set forth in the decree is reasonably calculated to remedy the harmful effects of the behavior set forth in the

---

[8] *See also United States* v. *International Telephone & Telegraph Co.*, 349 F.Supp. 22 (D.Conn. 1972), *aff'd mem. sub nom. Nader* v. *United States*, 410 U.S. 919 (1973); *United States* v. *Carter Products, Inc.*, 211 F.Supp. 144, 148 (S.D.N.Y. 1962) ("if a consent decree will afford substantially the same relief that could be obtained after a hearing upon the merits, such consent procedure should be adopted.")

complaint. *United States* v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970).[9]

This remains the law under the Antitrust Procedures and Penalties Act. That legislation was designed to modify the procedures by which consent decrees are entered. The Senate Report stated:

> By definition, antitrust violators wield great influence and economic power. They can often bring significant pressure to bear on government . . . in connection with handling of consent decrees. S.782 recognizes that in some instances, there may be a need for additional participation by interested parties in the approval of consent decrees.

S.Rep. No. 298, *Antitrust Law Amendments*, 93d Cong., 1st Sess. 5 (1973). The House Report made clear that the legislation, although reforming procedures, was not intended to disturb existing "case law" as to the standards for approval of consent decrees. H.Rep. No. 528, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6535, 6539.

Subsequent cases have confirmed that the Antitrust Procedures and Penalties Act did not alter pre-existing standards governing the propriety of antitrust consent decrees. *See United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127, 1141-42 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. at 44-45. *Cf. also United States* v. *Bechtel Corp.*, 648 F.2d

---

[9] *See also United States* v. *International Telephone & Telegraph Corporation*, 349 F.Supp. at 25-26, *United States* v. *Combustion Engineering, Inc.*, 364 F.Supp. 181, 183-84 (D.Conn. 1972); *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 41-42 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976).

660 (9th Cir.), *cert. denied sub nom. Bechtel Corp.* v. *United States*, 454 U.S. 1083 (1981); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737 (D. Vt. 1981); *United States* v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978). As the court stated in the *Bechtel* case:

> We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public. The balancing of competing social and political interests affected by a proposed decree must be left, in the first instance, to the discretion of the Attorney General. . . . The court is not required to determine whether a particular decree is the one that will best serve society . . .

United States v. *Bechtel Corp.*, 648 F.2d at 666.

In short, the Antitrust Procedures and Penalties Act does not accord to the judiciary either the duty or the privilege of supplanting the reasonable judgments of the Department of Justice. When the government's determination of appropriate terms for the settlement of antitrust litigation is neither tainted by improper influence nor flawed with false logic, a judge's conviction that there exists a superior plan for settlement must give way to the government's preference.

REASONS FOR PLENARY CONSIDERATION

The terms of the modification of final judgment entered by the District Court will take effect on or before February 24, 1984. A final determination by this Court of the lawfulness of the District Court action in advance of that date is imperative. Although the issue raised by this appeal is not unduly complex, we believe that its resolu-

tion is sufficiently important to warrant full briefing and consideration.

Respectfully submitted,

ALBERT H. KRAMER
Counsel of Record

N. FRANK WIGGINS
COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for
Appellants

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; AND
BELL TELEPHONE LABORATORIES, INC.,

Defendants.

Civil Action No. 82-0192

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendants.

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO THE COURT'S OPINION OF AUGUST 11, 1982

The United States submits this Memorandum in response to the Court's Opinion of August 11, 1982 ("Opinion") in which the Court indicated that it would approve the agreement reached between the United States and AT&T in the above referenced actions on the condition that the parties agree to several modifications. The Opinion requires the parties, within fifteen days, to submit to the Court a proposed decree incorporating the Court's proposed modifications, or a statement that they are not prepared to incorporate such modifications. Because

the alternatives available would pose unacceptable costs to the public interest, including delay in the reorganization process, the United States is prepared to agree to the Court's revisions, and will transmit that assent to the Court on or before the date set in the Court's order. The United States respectfully urges the Court, however, to consider modifying one of its proposed revisions.

In brief, the United States proposes that, to the extent the BOCs are permitted to market customer premises equipment, the type of such equipment be limited, at least for the present, to residential or single-line business customer premises equipment. For the reasons set forth below, the United States continues to believe that there is a very substantial competitive danger in allowing BOCs to provide, without limitation, more complex customer premises equipment. The United States therefore suggests that a post-divestiture proceeding consistent with the standards and procedures proposed at pages 116-117, 176 [J.A. 113-114, 170] of the Opinion would provide an appropriate occasion to consider removal of the restrictions with respect to such complex equipment.

Deferral of this decision would permit the Court to consider the difficult question of BOC entry into these particular competitive markets on the basis of a record focused on the particular facts and circumstances relevant to the competitive costs and benefits of BOC participation. This procedure would not entail the risks to the public interest that we believe would flow from BOC provision of complex customer premises equipment. At the same time, if on hearing the evidence and argument presented, the Court determines that the particular plans for marketing complex CPE that the BOCs propose do not present substantial competitive danger, the procedure would delay BOC entry little, if at all, beyond the time it could occur under the Court's August 11 proposals. In summary we ask the Court to consider whether the decree would meet the public interest standard if it allowed immediate BOC entry into marketing relatively simple CPE, but postponed a decision as to marketing complex CPE until the development of a record

addressed to the distinct problems such marketing presents, under the general standard the Court has established and in light of the particular plans the BOCs may propose.

The rationale for the Court's proposed modification allowing the BOCs to market, but not manufacture, customer premises equipment is that marketing, in contrast to manufacturing, presents "little potential for anticompetitive behavior" because the incentives of the BOCs and "their practical ability" to engage in such behavior "would be minimal." Opinion at 110. [J.A. 107.] The Court found that the possibility of discrimination would be remote because "it would be difficult for an Operating Company to conspire successfully with a manufacturer to provide advance information about revised network standards or to impose interconnection restrictions which favored that manufacturer's products and no one else's."[1] *Id.*

In its Response to Comments, at page 68, the United States agreed that BOC provision of certain types of customer premises equipment, such as residential and single-line business customer premises equipment might well entail little competitive risk.[2] On the other hand, the Department stated that provision by the BOCs of more complex customer premises

---

[1] In contrast, the Court found that if the BOCs were permitted to manufacture customer premises equipment they would have "the ability to discriminate against equipment manufactured by others with respect to types of interconnections, testing, maintenance and similar matters." Opinion at 109. [J.A. 106.] As set forth below, if the BOCs were permitted to market, but not manufacture complex customer premises equipment, they might well have the very same ability to discriminate against the offerings of firms other than firms with which the BOCs have distribution arrangements.

[2] Residential and single-line business customer premises equipment includes equipment like telephone handsets, answering and recording devices, and data modems that can be purchased essentially "off the shelf" and installed by the customer with little or no necessary coordination with the local telephone company.

equipment, which necessarily involves a high degree of coordination between the equipment provider or customer and the local exchange carrier with respect to such matters as installation, maintenance, testing, and restoration, would pose substantial competitive dangers. In a different context, the FCC recognized significant distinctions between the installation and maintenance of residential and business customer premises equipment. In its opinion on further reconsideration of its *Second Computer Inquiry* decision the FCC stated: "We do not dispute AT&T's contentions that the installation and maintenance of business systems, such as PBX and key telephone systems, involve a degree of complexity that does not exist for single party residential service. In fact, based on how business is now actually conducted in the marketplace, there is little similarity between the installation and maintenance problems associated with residential and business equipment. . . . Our registration program also established common interfaces for various business systems. Yet the operational problems here are different from those in the residential arena. Business systems such as PBX and key telephone systems require more complex installation and maintenance." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order on Further Reconsideration*, at 19-20, §§ 53, 57 (Released October 30, 1981). None of the pleadings filed by interested persons appears to contest this distinction nor the ability of the BOCs to disadvantage competitors in the provision of sophisticated customer premises equipment.[3]

---

[3] The Brief of the Federal Communications Commission on Question No. 2 did not dispute the potential for anticompetitive conduct with respect to sophisticated customer premises equipment, but asserted that there is no evidence that such conduct has in fact occurred since the recent implementation of the CPE registration program. Brief at 9. The FCC suggested that "[a]t the very least, the prohibition should be revised to permit BOCs to provide CPE when Justice does not view the provision of CPE as a potential source of a

The Court appears to rest its conclusion that BOC provision of CPE would be procompetitive in large part upon the assumption that, shorn of ownership of a CPE manufacturer, a BOC would have no incentive to discriminate against the products of particular CPE providers. The validity of this assumption is, however, undercut to the extent that the BOCs distribute the products of only a limited number of manufacturers. While the BOCs will not have an incentive to choose their source of supply in a discriminatory manner, the decree might be interpreted to permit, and the impracticability of training installation and maintenance forces to install and service multiple suppliers' equipment may dictate, the choice of only one supplier, or a limited number of suppliers, for a particular type of equipment. As the North American Telephone Association (NATA) put it in its Reply Brief at 12, "[n]o distribution business can willy-nilly buy everybody's products. Each piece of equipment imposes new and different sales, installation and maintenance requirements; and each of these functions for each new product creates new and different training requirements. Hence, standardization on products becomes a practical business necessity if cost efficiencies and productivity are to be achieved." See also Stipulation Package 57C, Stipulation 71. For similar reasons, manufacturers of complex CPE may prefer that their products be marketed, installed, and maintained by personnel owing primary allegiance to their products, and thus avoid the use of multiproduct vendors.

A BOC selling the products of only a limited number of manufacturers would have a strong incentive to use its local

---

discrimination problem." *Id.* The Brief of the Public Service Commission of the District of Columbia on Topic Number 2 stated at page 5, "[t]he potential for such discrimination, if it exists at all, will exist only with respect to sophisticated expensive equipment, such as PBXs." The Brief of the Kansas Commission did not dispute the possibility of anticompetitive conduct, but stated that "[t]he manner in which equipment is interconnected would seem to be only secondary considerations" and that in any event regulatory authorities could easily detect such conduct. Kansas Commission Brief at 5.

exchange activities to achieve supracompetitive profits in the provision of nonregulated CPE, or even if CPE remained regulated, to expand the ratebase. The BOCs would thus have an incentive to disadvantage rival CPE providers. Moreover, the BOCs would have available several means of discriminating against their competitors in the provision of complex CPE in ways that could seriously undermine their ability to compete with BOC provided products on an equal basis.[4] Installation of new large customer premises switching systems may, for example, involve re-wiring entire buildings, re-engineering cable under the streets, and adjustments in local area network planning to accommodate the new installation. Installation of CPE used in the provision of innovative information services, such as centralized voice storage, may require even more complex interaction with the BOCs to implement particularized information access arrangements. The ability to guarantee these activities on schedule, with a smooth cutover to the new system, likely will often be critical to the customer's purchase decision. Permitting the BOCs to engage in the provision of such equipment and systems would give them the incentive and the ability to prefer their own products in these important activities. Likewise, the maintenance and testing of sophisticated equipment and systems offer similar opportunities for such behavior.[5] See NATA Brief at 7, note 2; Opinion at 109,

---

[4] It should be noted that it would not require a conspiracy between the BOC and the manufacturer to engage in such conduct successfully since it would be in the BOC's independent interest to do so and require little or no cooperation from the manufacturer.

[5] The consent decree, as written, only prohibits discrimination by the BOCs between AT&T and other enterprises. It thus does not address in injunctive terms the discrimination between other manufacturers and suppliers that could occur if the BOCs were permitted to offer complex customer premises equipment. As the Court has explained in other contexts, injunctive provisions are unlikely to foreclose this kind of discrimination effectively in any event. Even if injunctions were an appropriate remedy here, however, the United States believes that it would be necessary to carefully tailor the injunctive provisions to deal specifically with the problems that are likely to arise.

[J.A. 106] note 244. In sum, the United States continues to believe that BOC provision of customer premises equipment other than residential or single-line business customer premises equipment would present a substantial threat to the public interest and that there is no evidence or argument to the contrary now before the Court.[6]

The Court need not now reach a conclusion on this issue, however, to protect the public interest fully. Under the third modification proposed by the Court, the restrictions on the BOCs may be removed upon a showing by a BOC that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Opinion at 176. [J.A. 170.] This, the United States believes, is an entirely appropriate standard for removal of the restrictions. The United States believes, however, that with respect to customer premises equipment more complex than residential or single-line business equipment, this standard could best be applied in a separate proceeding pursuant to the procedures

---

[6] The Court's Opinion notes that permitting BOC provision of customer premises equipment would avoid "unnecessary intrusion into matters of direct interest to the states and state regulators. . . ." Opinion at 112, [J.A. 109] note 250. The United States believes that to the extent that there is a state interest in the provision of business customer premises equipment by the BOCs, it is overridden, just as any state interest in BOC provision of interexchange services is overridden, by the federal interest in assuring competitive telecommunications markets. Moreover, the United States is unaware that any state has expressed a distinct interest in having the BOCs provide complex business equipment. Indeed, to the extent that states have expressed specific concerns about customer premises equipment, the concerns appear to center on the provision of more basic types of residential equipment to rural customers or the less affluent. Of course, if customer premises equipment is dergulated pursuant to the FCC's *Second Computer Inquiry* decision, there will be no legitimate state interest in the provision of such equipment. If customer premises equipment remains regulated, on the other hand, the BOCs' incentive and ability to disadvantage competitors through cross-subsidization will only be increased.

developed by the Court for removal of other BOC line of business restrictions. The United States believes that this approach would provide an appropriate and effective mechanism for examining the likely competitive costs and benefits of BOC marketing, not only of such complex equipment as PBXs, but other less complex equipment that might, like residential and single-line business equipment, present relatively insubstantial competitive dangers. This procedure would provide the Court the opportunity to examine the question of BOC entry on a complete and focused record devoted exclusively to that question.[7] The BOCs would have every incentive to provide the Court the best evidence and argument at their disposal in support of lifting the restriction. If, indeed, BOC provision of complex customer premises equipment presents no substantial danger to competition the BOCs should be able to carry their burden. If not, of course, the restriction should be retained.

In addition, this procedure would pose no threat to the public interest in the interim between the entry of the consent decree and post-divesture proceedings in the event that the Court then finds that the restriction should be removed. First, the restriction, if retained, would not take effect until divestiture so that the BOCs could continue to offer customer premises equipment until that date to the extent permitted by regulatory authorities. Second, because embedded customer premises equipment will be transferred to AT&T, the BOCs could not, in any event, begin to offer such equipment immediately after divestiture. This procedure would thus provide the most complete possible protection of the public interest. It would permit

---

[7] As the United States explained in its Response to Comments, it is difficult to draw a viable distinction between products that present substantial competitive dangers and those that do not. Deferral of the decision on BOC entry would permit the Court to draw this distinction for particular kinds of equipment with respect to which the BOCs are able to show little likelihood of discriminatory conduct, based on a BOC's actual business plans.

full consideration of all relevant evidence and argument and would do so without impairing the public interest in vigorously competitive customer premises equipment markets at the earliest possible date.

Accordingly, the United States respectfully requests that the Court defer its consideration of BOC entry into the provision of complex customer premises equipment and amend its first proposed modification in the following manner:

VIII

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, residential and single-line business customer premises equipment.

Respectfully submitted,

/s/ _____

JAMES P. DENVIR
Attorney
Antitrust Division
United States Department of Justice
Washington, D.C. 20530
(202) 724-5778

WILLIAM F. BAXTER
Assistant Attorney General
Antitrust Division

RONALD G. CARR
Deputy Assistant Attorney General
Antitrust Division

RICHARD O. LEVINE
Director
Office of Policy Planning
Antitrust Division

Dated: August 19, 1982.

CERTIFICATE OF SERVICE

I, James P. Denvir, one of the attorneys for the United States, hereby certify that I have on this day served the *Memorandum of the United States In Response To The Court's Opinion Of August 11, 1982* on defendants by delivering a copy thereof to:

GEORGE L. SAUNDERS, JR., ESQ.
SIDLEY & AUSTIN
c/o AT&T
499 South Capitol Street
8th Floor
Washington, D.C. 20003

/s/ _____
JAMES P. DENVIR

Dated: August 19, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; AND
BELL TELEPHONE LABORATORIES, INC.,

Defendants.

Civil Action No. 82-0192

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendants.

MEMORANDUM OF THE UNITED STATES

Many of the changes that the Court prescribed in its August 11 opinion before it will approve the proposed consent decree reflect and make explicit matters that, in the view of the United States, were implicit in the decree as submitted by the parties. To these changes, which place the decree's obligations in more concrete form, the United States readily agrees. As the papers it previously has filed in this matter indicate, however, the United States has substantial doubts that certain other changes are properly within the scope of the Court's authority under the public interest standard, or are supported by the antitrust theory and the record in these cases. The United States believes, in particular, that the revision allowing the BOCs to market customer premises equipment presents a significant risk of anticompetitive conduct, relating primarily to the marketing of complex business equipment,

although the extent of the risk depends on how the revision is interpreted. Despite its reservations on these points, the United States believes that the public interest can be served only if the reorganization of AT&T, which lies at the center of the proposed decree and which the Court unequivocally has approved, is undertaken as soon as possible. The alternatives to accepting the Court's revisions would delay the reorganization indefinitely, with great costs to the industry and ultimately the public. Accordingly, the United States has decided to accept the Court's revisions and submits herewith, for entry by the Court, a revised decree, stipulated to by AT&T and by the United States, that incorporates the changes the Court required in its August 11 opinion.*

Respectfully submitted,

/s/ Ronald G. Carr

RONALD G. CARR
Deputy Assistant Attorney General
Antitrust Division
United States Department of Justice
Washington, D.C. 20530
(202) 633-2411

Dated: August 24, 1982

---

*In the process of incorporating the Court's modifications, the parties discovered a number of minor typographical errors in the decree as originally submitted. These errors, with one exception, have been corrected in the revised decree and are reflected in the errata sheet appended to this Memorandum. In Section IV of the decree as originally submitted, the paragraph designation "M" was inadvertantly omitted, so that paragraph "N" follows paragraph "L." This omission was simply an error in alphabetizing and does not reflect a substantive omission. Because these and subsequent paragraphs have been referred to in various pleadings filed with the Court, correction of this error in the revised decree might cause confusion in the future. The parties, therefore, have not changed Section IV to correct this typographical error.

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION,
Intervenor/Appellant,

v.

UNITED STATES OF AMERICA,
and
WESTERN ELECTRIC COMPANY, INC.,
AND AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

---

MOTION OF INTERVENOR/APPELLEE TANDY CORPORATION TO DISMISS OR AFFIRM

MALCOLM R. PFUNDER,
Counsel of Record
JANET E. PITTERLE
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
Counsel for Intervenor/Appellee

December 22, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

As stated in the Jurisdictional Statement of Intervenor/appellant North American Telephone Association (NATA), the question presented by its appeal is as follows:

Did the District Court correctly construe and apply the Antitrust Procedures and Penalties Act in reaching the conclusion that a settlement agreement precluding Bell Operating Company participation as suppliers of unregulated CPE, although within the reaches of the public interest, ought not to be entered because the Court's conception of the remedy that would maximize competitive conditions in CPE markets differed from the Department of Justice's view of the remedy that would maximize competitive conditions?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION OF INTERVENOR/APPELLEE TANDY CORPORATION TO DISMISS OR AFFIRM	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTES INVOLVED	3
COUNTERSTATEMENT OF THE CASE	4
REASONS FOR DISMISSING THE APPEAL OR, IN THE ALTERNATIVE, AFFIRMING THE JUDGMENT BELOW	7
I. The Question Presented By NATA For Review Is Moot	7
II. The District Court Judge Had The Authority To Require Modification Of The Proposed Consent Decree	9
III. The District Court's Reasons For Requiring Modification Of The Proposed Consent Decree Are Unchallenged	13
IV. BOC Entry Into CPE Marketing Is An Essential Component Of A Consent Decree Satisfying The Public Interest Standard	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Benton v. *Maryland*, 395 U.S. 784 (1969)	8
Coastal Petroleum Co. v. *Secretary of the Army*, 547 F.2d 288 (5th Cir. 1977)	7
International Boxing Club of New York, Inc. v. *United States*, 358 U.S. 242 (1959)	11, 13
North Carolina v. *Rice*, 404 U.S. 244 (1971)	8
Samoff v. *International Association of Machinists District Lodge No. 1*, 420 F.2d 952 (3d Cir. 1969), *cert. denied*, 398 U.S. 965 (1970)	8
Securities and Exchange Commission v. *Medical Committee For Human Rights*, 404 U.S. 403 (1972)	8
United States v. *Agri-Mark, Inc.*, 512 F.Supp. 737 (D.Vt. 1981)	10
United States v. *Alaska S.S. Co.*, 253 U.S. 113 (1920)	8
United States v. *American Telephone and Telegraph Co.*, 1982-2 Trade Cas. ¶ 64,900 (D.D.C.)	2
United States v. *American Telephone and Telegraph Co.*, 1982-2 Trade Cas. ¶ 64,980 (D.D.C.)	2
United States v. *American Telephone and Telegraph Co.*, 34 Fed.R.Serv.2d 991 (D.D.C. 1982)	2
United States v. *American Telephone and Telegraph Co.*, 524 F.Supp. 1336 (D.D.C. 1981)	4
United States v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976)	11
United States v. *Automobile Manufacturers Association, Inc.*, 307 F.Supp. 617 (C.D.Cal. 1969), *aff'd*, 397 U.S. 248 (1970)	11
United States v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981)	10
United States v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978)	10
United States v. *General Dynamics Corp.*, 415 U.S. 486 (1974)	13
United States v. *Gillette Co.*, 406 F.Supp. 713 (D.Mass. 1975)	10

Table of Authorities Continued

Page

United States v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970) 11

United States v. *Western Electric Co.*, 1956 Trade Cas. ¶ 68,246 (D.N.J.) 3

STATUTES:

15 U.S.C. § 2 ..... 3, 4

15 U.S.C. § 16(b)-(h) 5, 7, 10

15 U.S.C. § 29(b) 3, 7

REPORTS:

H.R. Rep. No. 1463, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6535 ..... 10, 11

S. Rep. No. 298, 93d Cong., 1st Sess. (1973) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-992

NORTH AMERICAN TELEPHONE ASSOCIATION,
Intervenor/Appellant,

v.

UNITED STATES OF AMERICA,
and
WESTERN ELECTRIC COMPANY, INC.,
AND AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION OF INTERVENOR/APPELLEE TANDY CORPORATION TO DISMISS OR AFFIRM

Intervenor/appellant North American Telephone Association has appealed from a final judgment of the United States District Court for the District of Columbia approving a consent decree proposed by the United States Department of Justice and defendants American Telephone and Telegraph Company (AT&T) et al.[1] Pur-

[1] In addition to the parties listed in the caption of the case in this Court, the District Court granted intervenor status to numerous parties, which are listed in the District Court's Order of August 26, 1982, reproduced in the Joint Appendix at pp. 191-94. *See* note 3, *infra*.

suant to Rule 10.5 of the Supreme Court Rules, Intervenor/appellee Tandy Corporation[2] respectfully moves this Court to dismiss NATA's appeal as moot or, alternatively, to affirm the portion of the District Court's judgment permitting the Bell Operating Companies (BOC's) to market customer premises equipment (CPE).

OPINIONS BELOW

The opinion of the District Court, issued on August 11, 1982, is reported at 34 Fed.R.Serv.2d 991 (D.D.C. 1982) and is reproduced in the Joint Appendix (hereinafter cited as J.A.)[3], pp. 1-172. The District Court's order modifying the Final Judgment originally entered on January 24, 1956, was filed on August 24, 1982, is reported at 1982-2 Trade Cas. ¶ 64,900 (D.D.C.) and is reproduced in the Joint Appendix, pp. 173-190. The District Court's Memorandum opinion dated August 23, 1982, denying the Government's request for reconsideration of the portion of its opinion of August 11, 1982, relating to customer premises equipment marketing is reported at 1982-2 Trade Cas. ¶ 64,980 (D.D.C.) and is reproduced in the Joint Appendix, pp. 195-200.

The District Court's order granting intervenor status, entered on August 26, 1982, is not reported but is repro-

---

[2] Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal from the United States District Court for the District of Columbia, filed with this Court on November 17, 1982 (No. A-449).

[3] Both Tandy Corporation and NATA joined with several states and state public service commissions in submitting a Joint Appendix to their individual jurisdictional statements, which is separately bound and is incorporated by reference herein.

duced in the Joint Appendix, pp. 191-194. The District Court's order entered on November 10, 1982, certifying this case for direct appeal pursuant to the Expediting Act is not reported but is reproduced in the Joint Appendix, pp. 204-08.

JURISDICTION

NATA has appealed from a final judgment entered in the United States District Court for the District of Columbia approving a consent decree that modifies the 1956 Final Judgment in the *Western Electric* case[4] and settles an action brought by the Government in 1974 in the District Court for the District of Columbia under Section 2 of the Sherman Act, 15 U.S.C. § 2. The District Court's opinion was issued on August 11, 1982. (J.A. at 1). The Order modifying the 1956 Final Judgment in the *Western Electric* case was filed on August 24, 1982. (J.A. at 173). Tandy Corporation was granted intervenor status by the District Court's Order of August 26, 1982 (J.A. at 191). On November 10, 1982, the District Court entered an Order certifying a direct appeal to this Court pursuant to the Expediting Act, 15 U.S.C. § 29(b). (J.A. at 204). Federal jurisdiction is based upon 28 U.S.C. § 1337, and the jurisdiction of this Court is invoked under 15 U.S.C. § 29(b).

STATUTES INVOLVED

The statutory provisions involved are identified in NATA's Jurisdictional Statement at p.3 and set out verbatim at J.A., pp. 242-47.

---

[4] *United States* v. *Western Electric Co.*, 1956 Trade Cas. ¶ 68,246 (D.N.J.).

COUNTERSTATEMENT OF THE CASE

On January 24, 1956, the District Court for the District of New Jersey approved a proposed consent decree between AT&T and the Department of Justice, putting an end to a case that had begun in 1949 with the filing of a complaint by the Government against AT&T and its subsidiary the Western Electric Company, Inc. *United States* v. *Western Electric Co.*, Civil Action No. 17-49.[5] That complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies, in violation of Sections 1, 2 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 2 and 3. Among the provisions of the 1956 consent decree was a prohibition on AT&T's engaging in any business other than the provision of common carrier communications services.

On November 20, 1974, the Department of Justice filed another antitrust suit against AT&T, Western Electric and Bell Telephone Laboratories, Inc., alleging monopolization of telecommunications services and equipment in violation of Section 2 of the Sherman Act. *United States* v. *American Telephone and Telegraph Co. et al.*, Civil Action No. 74-1698 (D.D.C.) (the *AT&T* case). Trial began in January, 1981. Following conclusion of the Government's case, the Court denied defendants' motion to dismiss the action. *United States* v. *American Telephone and Telegraph Co.*, 524 F.Supp. 1336 (D.D.C. 1981). On January 8, 1982, with the defendants having presented virtually their entire case, the parties advised

---

[5] The *Western Electric* case was assigned a new docket number (C.A. No. 82-0192) when it was subsequently transferred to the District Court for the District of Columbia.

the Court they had reached agreement on a proposed decree.

Rather than "settling" the *AT&T* case, which they had been litigating since 1974, the parties sought a dismissal of that case and simultaneously filed a "Modification of Final Judgment" with the District Court for the District of New Jersey, which was to replace the *Western Electric* decree with an entirely new decree. On January 11, 1982, the District Court for the District of New Jersey approved the proposed Modification. Subsequently, on motion of the parties, the New Jersey Court transferred the *Western Electric* action to the Court hearing the *AT&T* case, and the latter vacated the January 11 Order approving the proposed Modification. By agreement of the parties, the District Court ordered that procedures equivalent to those required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the Tunney Act), be applied to the proposed settlement.[6]

The proposed settlement required the divestiture of the twenty-two BOC's from AT&T and limited the BOC's to providing local telephone exchange service. The divested BOC's were not permitted under that proposal to manufacture or market telecommunications products or CPE, or to provide interexchange services, directory advertising such as the Yellow Pages, information services, or any other product or service which is not a "natural monopoly service actually regulated by tariff."

In furtherance of its review of the proposed decree, the Court solicited comments from interested persons. Over 600 comments were received. In its Comments, Tandy

---

[6] The parties initially took the position that the Tunney Act did not apply to modifications of existing decrees.

urged, *inter alia*, that the BOC's should be permitted to sell, but not manufacture, CPE. *Comments of Tandy Corporation* (filed April 20, 1982).

Following review of the comments submitted by Tandy and other interested parties, and responses from AT&T and the Department of Justice, the Court on May 25, 1982, specified a number of issues for further briefing. Among the issues it raised were the absence of restrictions on AT&T, and the restrictions proposed for the divested BOC's. Tandy filed briefs addressing most of the issues it had discussed in its Comments, once again urging, *inter alia*, that the BOC's be permitted to sell, but not manufacture, CPE.

On June 17, 1982, the Court scheduled oral argument on the issues specified in the Court's May 25 Order. Counsel for Tandy was designated one of the lead counsel on the issue regarding "Restrictions on Bell Operating Companies." At that hearing, held June 29, 1982, Counsel for Tandy reiterated the arguments regarding the CPE issue Tandy had previously raised in its filings. (Oral Argument Transcript at 25169-25178).

In its August 11, 1982, opinion the Court determined that the prohibition on CPE marketing was not in the public interest and indicated it would not approve the decree unless AT&T and the Justice Department would agree to several specified changes, one of which would permit the divested BOC's to provide, but not manufacture, CPE. (Slip op. at 112, J.A. at 109). The Court also indicated that it would grant intervenor status to those who previously had filed requests or motions to intervene. (Slip op. at 164, J.A. at 159).

On August 23, 1982, the Court denied the Government's request that it reconsider its position regarding the BOCs' participation in the CPE market. (J.A. at 195).

The parties then submitted a proposed decree incorporating the Court's required changes and on August 24, 1982, the Court entered the amended Modification of Final Judgment, vacated the provisions of the 1956 consent decree (J.A. at 173) and ordered the *AT&T* case dismissed. On August 26, 1982, it granted intervenor status to numerous parties, including Tandy Corporation.[7] Several intervenors filed timely Notices of Appeal in the U.S. District Court for the District of Columbia. On November 10, 1982, in response to motions filed by the United States and three intervenors pursuant to the Expediting Act, 15 U.S.C. § 29(b), the District Court certified that the "immediate consideration of the appeals taken herein by the Supreme Court is of general public importance in the administration of justice." (J.A. at 207).

REASONS FOR DISMISSING THE APPEAL OR, IN THE ALTERNATIVE, AFFIRMING THE JUDGMENT BELOW

I. The Question Presented By NATA For Review Is Moot.

NATA has requested Supreme Court review of the question whether the District Court had the power under the Tunney Act, 15 U.S.C. § 16(b)-(h), to require the parties to modify their proposed consent decree as a condition of the Court's entry of that decree. Because the parties agreed to the modification required by the District Court, that question is moot. *See Coastal Petroleum Co.* v. *Secretary of the Army*, 547 F.2d 288, 289 (5th Cir. 1977) (After parties reached a settlement which was en-

---

[7] Intervenors were granted limited rights, including the right to appeal from the Court's approval of the proposed settlement and the right (to the extent permitted by the reviewing courts) to support the decisions of the Court in any appeal taken by another intervenor. *See* J.A. at 193-94.

tered by the District Court, Court of Appeals declined to decide a pending issue which had previously been certified by District Court); *Samoff* v. *International Association of Machinists District Lodge No. 1*, 420 F.2d 952, 953 (3d Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (Appeal by charging parties who objected to stipulation entered into by union with NLRB dismissed as moot).

This Court has no power to issue advisory opinions;[8] it "may act only in the context of a justiciable case or controversy." *Securities and Exchange Commission* v. *Medical Committee For Human Rights*, 404 U.S. 403, 407 (1972); *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969). "To be cognizable in a federal court, a suit . . . must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (citations omitted). Thus, in the absence of a real controversy, the question presented becomes moot and this Court lacks jurisdiction "to decide moot questions or abstract propositions." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246, *quoting United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

The specific modification to which NATA objects relates to the marketing of CPE by the divested BOC's. The consent decree negotiated between the Government and AT&T and presented to the District Court contained a provision that would have precluded the BOC's from providing CPE following their divestiture. The District Court found that such a prohibition was not in the public interest and required that the parties modify the proposed decree to eliminate it. (Slip op. at 112, J.A. at 109).

---

[8] *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

Although the Justice Department disagreed with Judge Greene's conclusion, it acquiesced in the required modification, as did AT&T.[9] The proposed consent decree was modified in accordance with Judge Greene's requirements and resubmitted to the District Court, which promptly approved it. Since both parties agreed to the modification of their proposed consent decree and the District Court approved the modified decree in the form submitted by the parties, the question of the District Court's power to require the modification is no longer at issue.

II. The District Court Judge Had The Authority To Require Modification Of The Proposed Consent Decree.

NATA argues that "the Antitrust Procedures and Penalties Act does not accord to the judiciary either the duty or the privilege of supplanting the reasonable judgments of the Department of Justice." (Jurisdictional Statement at 10).[10] If by that is meant that the District Court lacks the power, *over the objections of the Department of Justice*, to modify a consent decree proposed by

---

[9] In light of the Government's acquiescense, its "continued dedication to the originally proposed settlement terms" (NATA Jurisdictional Statement at 6 n.7) is, of course, irrelevant.

[10] NATA attempts to skirt a difficult threshold issue (i.e., determining the "reasonableness" of the Justice Department's judgment) by asserting that the originally proposed consent decree was at least "within the reaches of the public interest" (Jurisdictional Statement at i). Indeed, NATA erroneously states that the District Court so found. (Jurisdictional Statement at 8, citing J.A. at 32-33). There does not appear to be any support for NATA's assumption that the originally proposed decree was "within the reaches of the public interest" on this issue. The District Court in fact explicitly concluded that the prohibition on BOC marketing of CPE was *not* in the public interest. (Slip op. at 112, J.A. at 109).

the Department, that issue is not before the Court on this appeal. If instead NATA is suggesting that the District Court lacked the authority to disagree with the Justice Department's interpretation and application of the Tunney Act's public interest standard,[11] that position is not legally supportable.

In fact, just the opposite is true. As the District Court pointed out, "[i]t is clear that Congress wanted the courts to act as an independent check upon the terms of decrees negotiated by the Department of Justice." *See* slip op. at 27 & n.75 and cases cited therein, J.A. at 28. A principal aim of the Tunney Act was to review the Justice Department's judgment in agreeing to a proposed antitrust consent decree, rather than to give such decrees "rubber stamp" approval, as NATA's approach implies. H.R. Rep. No. 1463, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6535, 6538-39. "The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface." *United States* v. *Gillette Co.*, 406 F.Supp. 713, 715 (D.Mass. 1975); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737, 739 (D.Vt. 1981). Instead, one of the central purposes of the Tunney Act was to require "case by case judicial scrutiny" of proposed consent decrees. H.R. Rep. No. 1463, *supra*, 1974 U.S. Code Cong. & Ad. News at 6543.

---

[11] The Tunney Act requires the trial court to determine whether a proposed consent decree is in the public interest before the consent judgment can be entered. 15 U.S.C. § 16(e); *United States* v. *Bechtel Corp.*, 648 F.2d 660, 665 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *Agri-Mark, Inc.*, 512 F.Supp. 737, 739 (D.Vt. 1981); *United States* v. *Carrols Development Corp.*, 454 F.Supp. 1215, 1222 (N.D.N.Y. 1978).

The District Court's authority to review the terms of a proposed consent decree—and the extent of its discretion in the exercise of that authority—are well established. H.R. Rep. No. 1463, *supra*, 1974 U.S. Code Cong. & Ad. News at 6538-39, quoting S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973); and *see International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 251-52 (1959). The Court may not defer to the judgment of the Justice Department if that judgment is not consistent with the public interest. The trial court is free to reject the settlement proposed by the Justice Department,[12] or to condition approval of the consent decree upon acquiescence of the parties to specified changes. *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 40 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) (District Court entered proposed consent decree only after Government and defendant agreed to certain substantive modifications of order); *United States* v. *Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301, 1310 (W.D.Pa. 1970) (Court conditioned approval of proposed decree on addition of safeguards to employee benefit and pension funds).

NATA appears to suggest that "when the government's determination of appropriate terms for the settlement of antitrust litigation is neither tainted by improper influence nor flawed with false logic" (Jurisdictional Statement at 10), then the settlement proposed by the Government is by definition consistent with the public interest and must be approved by the District Court. Again, however, there is no support for NATA's reading of the Tunney Act. Judge Greene explicitly rejected such

---

[12] *United States* v. *Automobile Manufacturers Association, Inc.*, 307 F.Supp. 617, 620-21 (C.D. Cal. 1969), *aff'd*, 397 U.S. 248 (1970).

a reading for three reasons—the magnitude of the impact of the proposed decree upon the entire telecommunications industry and related interests, the Court's intimate familiarity with the industry and with AT&T's alleged antitrust violations by reason of the lengthy trial proceedings prior to the settlement, and legitimate questions concerning prior exercise of the Justice Department's judgment in connection with proposed consent decrees in the 1949 and 1974 suits against AT&T. (Slip op. at 31-36, J.A. at 31-36). NATA simply ignores this reasoning, seeking neither to challenge nor to refute it.

Instead, NATA offers only this conclusory assertion:

> Judge Greene . . . assigned too much credit to the short run value of offsetting AT&T's dominant position in CPE markets with the countervailing competitive strength of the BOCs as a supplement to existing competition in those markets.

(Jurisdictional Statement at 7). While one may either agree or disagree (as Tandy does) with NATA's value judgment, NATA does not explain its relevance to the question of Judge Greene's legal authority to require modification of the originally proposed consent decree.

The District Court correctly stated the purpose of the Tunney Act (slip op. at 25-27, J.A. at 25-28) and explained why unquestioning deference to the proposal submitted by the parties would be inconsistent with the Tunney Act's public interest requirement. (Slip op. at 31-36, J.A. at 31-36). Thus, there simply is no basis for NATA's narrow interpretation of the Tunney Act's public interest standard and thus no reason for more extensive briefing or oral argument on this issue.

III. The District Court's Reasons For Requiring Modification Of The Proposed Consent Decree Are Unchallenged.

The thrust of NATA's argument goes only to the legality of the District Court's rejection of the "reasonable" judgment of the Justice Department in framing the terms of the proposed settlement, rather than to the District Court's reasons for requiring modification of those terms. The District Court's own opinions provide sound and fully adequate justification for the required modification, and NATA challenges that justification—if at all—only by implication.

The District Court's requirement of a modification in the proposed consent decree to permit BOC marketing of CPE rested on two related conclusions. First, the Court in effect determined that the prohibition on BOC marketing of CPE was unnecessarily anticompetitive. The District Court found the proposed restriction on BOC marketing of CPE "directly anticompetitive." (Slip op. at 102, J.A. at 99). Even the Department of Justice conceded that "restrictions on entry are generally anticompetitive and deserve the most careful scrutiny." (Department of Justice Response to Comments, May 20, 1982, at 56). The District Court believed that restriction to be unnecessary because it found the likelihood of anticompetitive conduct by the BOC's in the marketing of CPE to be low. (Slip op. at 110-11, 174, J.A. at 106-08, 168-69; Memorandum opinion of August 23, 1982, at 2-5, J.A. at 196-99). Not only are these factual conclusions of the District Court entitled to substantial deference;[13] but nowhere in its jurisdictional statement does NATA seek to challenge them.

---

[13] *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974); *International Boxing Club of New York, Inc.* v. *United States, supra*, 358 U.S. at 251.

The other basis for the District Court's action was its determination that the procompetitive impact of BOC entry into CPE marketing was essential to satisfy the public interest standard of the Tunney Act. The Court found that the BOC's would make a "very substantial contribution . . . to vigorous competition in the customer premises equipment market." (Slip op. at 111, J.A. at 108). It also concluded that:

> When that remote risk [of anticompetitive conduct by the BOC's] is balanced against the certainty that the Operating Companies would be a strong counterweight to the domination of the customer premises market by AT&T, the Court can only conclude that the restriction proposed by the government is not justified.

(Memorandum opinion of August 23, 1982, at 3; J.A. at 197). NATA does not challenge these findings, or their underlying rationale. Instead, it relies simply on its own unsupported suggestion that Judge Greene gave too much weight to the procompetitive impact of BOC entry and too little to the dangers of possible anticompetitive conduct by the BOC's.

NATA thus supplies no compelling reason supporting the need for plenary consideration of its appeal.

IV. BOC Entry Into CPE Marketing Is An Essential Component Of A Consent Decree Satisfying The Public Interest Standard.

The consent decree settling the Government's antitrust action against AT&T will have an enormous impact upon the telecommunications industry. The District Court found that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications re-

> search, and the production and marketing of equipment. . . . In addition, the Bell System as presently constituted has few powerful competitors in any of the activities in which it is engaged.

(Slip op. at 101, J.A. at 98). The Government suit was brought to attack this Bell System monopoly. In order to satisfy the Tunney Act's public interest standard, the consent decree settling that suit must provide an effective remedy that undermines, and ultimately dissipates, the monopoly power of AT&T which the suit itself challenged. (Slip op. at 29-30 and cases cited therein, J.A. at 30). The decree, if properly framed, would accomplish that essential goal by introducing effective competition into the markets that have historically been dominated by AT&T.

It is particularly important that the proposed decree assure an effective remedy for AT&T's domination of the CPE market. Under the decree approved by the District Court, AT&T will nevertheless be by far the largest nationwide retailer of CPE after divestiture of the BOC's. There presently is no other competing retail distribution system with the accumulated goodwill, market position and marketing resources that remotely approach those of AT&T in the CPE market. Independent manufacturers and marketers of CPE simply cannot by themselves provide effective competition with AT&T, which could thus continue to dominate CPE marketing in this country for the foreseeable future.

The BOC's are the only potential entrants into CPE marketing that have the ability to inject effective competition that could challenge AT&T's dominance. Obviously, their historic ties with the Bell System, their retention of the Bell trade name and marketing logo, and their existing customer relationships with telephone us-

ers will give them substantial advantages in CPE marketing unavailable to any other potential entrant or present competitor of AT&T. Permitting the BOC's to enter the CPE market is thus an essential prerequisite to creation of meaningful competition where none has previously existed.

The District Court correctly considered these advantages and opportunities. It also recognized the possibility of BOC abuse of their position. Weighing carefully the Government's warnings about the possible incentives for such abuse, the Court nevertheless dismissed as remote the likelihood of any anticompetitive conduct by the BOC's. The District Court was in an excellent position to assess the Government's arguments; it ultimately found them unconvincing on the facts presented. Those issues having received full consideration by the District Court, there is neither occasion nor compelling reason for additional detailed review by the Supreme Court.

Tandy Corporation thus respectfully urges the Supreme Court to affirm summarily the decision of the District Court to permit BOC entry into CPE marketing.

CONCLUSION

For the foregoing reasons, Intervenor/appellee Tandy Corporation respectfully moves that this appeal be dismissed as moot or, alternatively, that the portion of the judgment of the District Court for the District of Columbia permitting the BOC's to market CPE equipment be affirmed.

Respectfully submitted,

MALCOLM R. PFUNDER,
Counsel of Record
JANET E. PITTERLE
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
Counsel for Intervenor/Appellee Tandy Corporation

Office-Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH AMERICAN TELEPHONE ASSOCIATION,
Appellant,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTIONS TO AFFIRM

ALBERT H. KRAMER
Counsel of Record
N. FRANK WIGGINS
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for Appellant

December 30, 1982

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

ARGUMENT 1

I. NATA's Appeal Suffers No Procedural Irregularity 2

II. The Entry of an Antitrust Consent Decree Within the "Public Interest" Does Not Cure the Error of Improper Rejection of Other Terms for Settlement Also Consistent with the "Public Interest" 4

A. By Elevating Its Assessment of the Most Effective Remedial Scheme Over That of the Department of Justice, The District Court Violated the Antitrust Procedures and Penalties Act 6

B. The District Court's Subsequent Entry of a Consent Decree Does Not Preclude NATA's Appeal 0

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 10

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied sub nom. Leipzig v. Baldwin,* 431 U.S. 913 (1977) 3

Bryant v. Yellen, 447 U.S. 352 (1980) 10

Cerro Metal Products v. Marshall, 620 F.2d 964 (3d Cir. 1980) 9

Page

Citibank, N.A. v. Data Lease Financial Corp., 645 F.2d 333 (5th Cir. 1981) 3

Drayer v. Krasner, 572 F.2d 348 (2d Cir.), *cert. denied*, 436 U.S. 848 (1978) 3

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 8

Murphy v. Hunt, 455 U.S. 478 (1982) 6

United States v. Bechtel Corp., 648 F.2d 660 (9th Cir.), *cert. denied sub nom. Bechtel Corp. v. United States*, 454 U.S. 1083 (1981) 7

Statutes and Rules:

Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h) (1976) ..... 5, *passim*

28 U.S.C. § 2111 (1976) 5

Fed.R.Civ.P. 61 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No 82-992

NORTH AMERICAN TELEPHONE ASSOCIATION,
Appellant,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY and WESTERN ELECTRIC COMPANY, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTIONS TO AFFIRM

ARGUMENT

The United States, AT&T[1] and Tandy Corporation ("Tandy") have filed motions to affirm summarily the actions of the U.S. District Court for the District of Columbia from which the North American Telephone Association ("NATA") has docketed an appeal in this Court by filing a jurisdictional statement on December 8, 1982. We submit this response to those motions.

[1]AT&T's wholly owned subsidiary Western Electric Company joined with it in that company's motion to affirm. The references to AT&T in this submission refer collectively to the parent company and its subsidiary.

In January of 1982 AT&T and the government presented the District Court with a proposal for settling their pending antitrust litigation. The negotiated settlement required that the Bell Operating Companies ("BOCs") once divested from ownership by AT&T could not engage in the manufacture or marketing of customer premises equipment ("CPE"). Judge Greene ruled, on August 11, 1982, that he would not enter the proposed settlement agreement unless the government and AT&T rewrote the consent decree to alter this term and allow the BOCs to market, but not to manufacture, CPE.

NATA believes this action to have been in error; it is that contention upon which this appeal is based. The motions for summary affirmance make two primary points. Neither has merit.

I. NATA'S APPEAL SUFFERS NO PROCEDURAL IRREGULARITY

The motions to affirm argue that NATA's appeal is infirm owing to a procedural flaw. AT&T put this position most directly:

> However, the question whether the January 8, 1982, proposal was properly rejected is not before the Court; neither the parties nor NATA have sought appellate review of that decision.

AT&T Motion to Affirm at 27.[2] We take this argument to suppose that a viable appeal of the District Court's rejection of the initially proposed settlement required the filing of a notice of appeal from either the August 11, 1982 opinion (J.A. 1-172) in which the court first signalled its dissatisfaction with the proscription of future BOC CPE marketing activities or of the August 23, 1982, opinion

[2]The United States makes essentially the same point in its Motion to Affirm at 30 n.36.

(J.A. 195-200) in which the court declined the government's entreaty to re-think that conclusion. We do not believe that the failure to appeal earlier interlocutory actions of the District Court – even if those non-final actions were properly appealable – disables NATA from achieving review of issues that can properly be said to have been merged into a final order from which an appeal was timely taken.

Appellate review of an appealable interlocutory order is not lost by the failure to take an immediate appeal:

> . . . an interlocutory appeal is permissive, not mandatory. When an appeal is not taken, the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment.

Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976), *cert. denied sub nom. Leipzig v. Baldwin,* 431 U.S. 913 (1977) (citation omitted). See also *Drayer v. Krasner,* 572 F.2d 348, 353 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978) ("Failure to take an authorized appeal from an interlocutory order does not preclude raising the question on appeal from the final judgment [citations omitted]. . . ."); *Citibank, N.A. v. Data Lease Financial Corp.,* 645 F.2d 333, 337 (5th Cir. 1981) (". . . a party's failure to appeal from an interlocutory order appealable as of right under § 1292(a) does not prevent review of that order upon a later appeal [citations omitted].")

The suggestions that the District Court's actions ought to be affirmed summarily because NATA has not properly perfected its appeal are devoid of any merit.

II. THE ENTRY OF AN ANTITRUST CONSENT DECREE WITHIN THE "PUBLIC INTEREST" DOES NOT CURE THE ERROR OF IMPROPER REJECTION OF OTHER TERMS FOR SETTLEMENT ALSO CONSISTENT WITH THE "PUBLIC INTEREST"

All three motions for summary affirmance urge that NATA's challenge to the District Court's rejection of the negotiated prohibition of BOC marketing of CPE has no merit because the subsequent entry of a consent decree mooted[3] or otherwise cured that legal error. The United States frames its contention on this score in the following terms:

> While the government agrees with NATA's substantive position on the sale of equipment by BOCs, the court's failure to accept the original proposal in this regard, even if erroneous, affords no legal basis for interfering with the decree subsequently entered.
>
> * * *
>
> It is the overall merit of that decree entered by the court, rather than past rulings on superseded bargains, that is at issue.

United States Motion to Affirm at 28-29, 30.

In its moving papers, the government discloses its conviction that Judge Greene's rejection of the negotiated settlement provision on future BOC marketing of CPE was both wrong and injurious:

> We believe that, in reaching this conclusion, the district court underrated the danger that the BOCs will disadvantage their competitors in interconnecting customer equipment. The court also ignored the fact that, if the BOCs are allowed to sell CPE, they will have the incentive

[3]The Tandy motion casts its argument in terms of mootness and requests dismissal of NATA's appeal on this ground. See n.5 *infra*.

> to discriminate against competitors in the installation and maintenance of equipment they sell and that such discrimination will impair competition at the manufacturing level as well.
>
> * * *
>
> In sum, we believe that the public interest would have been served better by the initial decree than by the decree subsequently agreed to by the parties and approved by the court.

United States Motion to Affirm at 29 n.35.[4] It remains, then, to understand why this error is protected from correction.

None of the motions affords a clear answer to this inquiry. So far as our research has disclosed, no court has endorsed the proposition that the entry of a consent decree consonant with the "public interest" standard of the Antitrust Procedures and Penalties Act absolves all errors commited in the process of reaching that final determination. In fact, substantial rights[5] secured by the Antitrust Penalties and Procedures Act have been violated by the

[4]In the papers filed by AT&T in the District Court, it necessarily took the position that the settlement terms originally presented to the court were within the public interest. Its motion papers in this Court do not disavow that position. Tandy's posture is different. Tandy argued in the District Court that the negotiated settlement was not in the public interest. It argues here that the modified agreement entered by the District Court is in the public interest to the extent that it permits the divested BOCs to engage in CPE marketing but contrary to the public interest in that further resources should have been left with the BOCs to assist their CPE marketing activities.

[5]Although not framed in these terms, the motions of AT&T and the United States might be read to assert that the District Court's error does not require remedy because it was harmless. The motions fail to establish that the error "do[es] not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976). See also Fed.R.Civ.P. 61.

It is plain that the erroneous rejection of the negotiated BOC restriction is not harmless in the sense of irrelevance to the outcome of

District Court's erroneous rejection of the ban on BOC marketing of CPE and NATA has the right to seek appellate cure of the error.

A. By Elevating Its Assessment of the Most Effective Remedial Scheme Over That of the Department of Justice, The District Court Violated The Antitrust Procedures and Penalties Act

We freely concede that the consent agreement entered by the District Court was in the "public interest" as that term is used in the statute.[6] The achievement of this result may not, however, be elevated above other values protected by the Antitrust Procedures and Penalties Act. The

---

the case. The final judgment would have been demonstrably different but for the error.

This consideration is germane to Tandy's assertion of mootness as well. As this Court noted recently:

> In general a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Murphy v. Hunt, 455 U.S. 478, 481 (1982). In the textual discussion that follows we establish that a substantial right appropriately asserted by NATA is at issue in this case. Thus, Tandy's claim of mootness fails along with the contentions of harmless error.

[6]In considering the impact of the act, it is important to have in mind that the statute nowhere suggests that a single "public interest" resolution is uniquely available for each lawsuit. The statutory standard is a broad one; there undoubtedly exist many outcomes to most pieces of antitrust litigation that would qualify as within the public interest under the act. We believe that, taken together with other settlement conditions, both the originally proposed ban on manufacture and marketing of CPE by the BOCs and Judge Greene's modification of that term qualify as in the public interest. It is not the case, however, that the statute is indifferent as between the results achieved by the two different schemes of relief. Nor does the act direct that a reviewing court treat one "public interest" outcome as statutorily equivalent to the next.

Antitrust Procedures and Penalties Act was adopted to secure appropriate public and judicial participation in the consent decree settlement of government antitrust cases. The statute defines and closely contains the role to be played by the judiciary in applying the public interest standard:

> We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public.
>
> The balancing of competing social and political interests affected by a proposed decree must be left, in the first instance, to the discretion of the Attorney General . . . . The court is not required to determine whether a particular decree is the one that will best serve society . . .

United States v. Bechtel Corp., 648 F.2d 660, 666. (9th Cir.), *cert. denied sub nom. Bechtel Corp. v. United States*, 454 U.S. 1083 (1981).

Judge Greene violated this standard of deference to the reasonable judgment of the Department of Justice. The District Court's rejection of the prohibition on CPE marketing by the BOCs recognized the "conceptual neatness", J.A. at 98, of the government's remedial approach but insisted that a relaxation of the relief negotiated by the Department of Justice would better serve the ends of competition.[7] The court was persuaded

[7] Judge Green's rationale was that the addition of the BOCs as CPE marketing competitors would make those markets more competitive. In line with this perception, the court accorded the divested BOCs more latitude than had been proposed by the government. The court's actions removes any available support for Tandy's assertion that a more than customarily active judicial role was warranted in this case owing to hints of previous governmental subservience to the wishes of AT&T. Any suspicion of government connivance with AT&T on the question of BOC CPE marketing is relieved by Judge Greene's finding that:

that the government had overstated the danger of future anticompetitive activities by the divested BOCs.

Assessment of the danger of future BOC abuse of monopoly power involves the exercise of "judgment and prediction rather than pure factual determination", *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 594 (1981), as to which the Department of Justice's vision ought to predominate.[8] The Antitrust Procedures and Penalties Act insists that where the Department of Justice has negotiated a settlement consistent with the public interest, that agreement, and not a different one dictated by the "judgment and prediction" of the judiciary, should be entered. It is this result that NATA's appeal seeks to achieve.[9]

> It appears that the Department is the principal proponent of the restrictions on the Operating Companies. AT&T has generally taken the stance that it agreed to these restrictions as part of the overall settlement.

J.A. at 98 n.227.

[8]Tandy's reliance on the familiarity of the District Court with the substance of the underlying antitrust violations as an apology for elevated judicial involvement is not apt in this case. The obvious mastery that Judge Greene established over complex facts and theories is not likely to extend to the future actions of companies newly created by the settlement agreement. There can be no evidence but only informed judgment concerning the gravity of the risk of anticompetitive conduct on which the government based its demand for a ban on BOC CPE marketing activities.

[9]A collateral argument raised by AT&T is inapplicable to NATA's appeal. AT&T notes that:

> Because the provisions of the decrees are interrelated and represent a single bargain, appellate courts are "powerless to rewrite the provisions of a settlement agreement" lest they change a provision that was essential to one party's assent.

AT&T Motion to Affirm at 26 (citations omitted). This concern is misplaced where the primary parties have previously agreed to the

B. The District Court's Subsequent Entry of A Consent Decree Does Not Preclude NATA's Appeal

The argument in the motions to affirm that the achievement of a correct outcome – defined as a settlement agreement in the public interest – cures all antecedent error is too facile in another sense. The government's motion tacitly advances the argument that only the signatories to the settlement agreement possessed the power to challenge Judge Greene's failure to enter the negotiated settlement agreement. United States Motion to Affirm at 29-30. Upon the decision of those parties to acquiesce to the District Court's demands, the government concludes, the opportunity to challenge the judge's error is lost. *Id.*

An intervenor has the right to appeal "from any order adversely affecting the interest that served as a basis for intervention." *Cerro Metal Products v. Marshall,* 620 F.2d 964 (3d Cir. 1980). NATA possesses two such interests in this case. The first centers on the interest of its members to be free from anticompetitive abuses. Although we cannot establish with mathematical certainty that the decree entered by the District Court will be less effectively protective of this interest than the provision preferred by the government, such proof is not necessary. *Bryant v. Yellen,* 447 U.S. 352, 366-368 (1980). The likelihood of superior protection under the BOC marketing prohibition erroneously supplanted by the District Court supplies a sufficient basis for NATA's appeal.

---

relevant settlement terms. Similarly, AT&T's reading of NATA's appeal as a request that the August 24 decree "be vacated in its entirety", *id.* at 27, supposes the necessity of relief neither requested nor thought appropriate by NATA. If this Court agrees with our contention that Judge Greene was wrong in his rejection of the ban on CPE marketing by BOCs, the August 24 order need be reformed, only by restoring a settlement term previously agreed to by AT&T and the government.

As a participant in the Antitrust Procedures and Penalties Act proceedings in the District Court, NATA also has a stake in the procedural regularity of the District Court's actions. The right of public scrutiny of and participation in antitrust settlements would be hollow indeed if the signatories to an agreement could shield procedural errors from review and correction by their acquiescence to such flaws.

Surely, both the quality of protection achieved by and integrity of the decisional process leading to the entry of antitrust consent decrees are "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970).

CONCLUSION

The motions for summary affirmance should be denied.

Respectfully submitted,

ALBERT H. KRAMER
Counsel of Record
N FRANK WIGGINS
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Attorneys for Appellant
North American Telephone
*Association**

*The statement required by Sup. Ct. R. 28.1 appears as n.5 of NATA's Jurisdictional Statement.